CIVIL NO. A154890/155334

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

SIX4THREE, LLC,
Respondent-Cross-Appellant,
vs.

FACEBOOK, INC.,
Appellant,

MARK ZUCKERBERG, CHRISTOPHER COX, JAVIER OLIVAN, SAMUEL LESSIN, MICHAEL VERNAL, ILYA SUKHAR, AND DOES 1-50, INCLUSIVE,
Cross-Respondents.

On Appeal From San Mateo Superior Court, Case No. CIV533328
Honorable V. Raymond Swope

BRIEF OF APPELLANT

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Barnes v. Yahoo Inc.
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Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC
(2008) 162 Cal.App.4th 858 55

Buxton v. Eagle Test Sys., Inc.
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Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.
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Chitsazzadeh v. Kramer & Kaslow
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City of Sacramento v. Drew
(1989) 207 Cal. App. 3d 1287 31

Country Side Villas Homeowners Ass'n v. Ivie
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Cross v. Facebook, Inc.
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Dean v. Friends of Pine Meadow
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Demetriades v. Yelp, Inc.
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Evans v Unkow
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Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC
(9th Cir. 2008) 521 F.3d 1157 48

Garcia v. Superior Ct.
(1990) 50 Cal.3d 728 54

Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.
(9th Cir. 2014) 742 F.3d 414 42

Green v. Am. Online (AOL)
(3d Cir. 2002) 318 F.3d 465 48

Grewal v. Jammu
(2011) 191 Cal.App.4th 977 34

Hall v. Time Warner, Inc.
(2007) 153 Cal.App.4th 1337 35

Klayman v. Zuckerberg
(D.C. Cir. 2014) 753 F.3d 1354 48

Kronemeyer v. Internet Movie Database, Inc.
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Kunysz v. Sandler
(2007) 146 Cal.App.4th 1540 31

Lam v. Ngo
(2001) 91 Cal.App.4th 832 33

Los Angeles Mem. Coliseum Commission v. Insomniac, Inc.
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Moradi-Shalal v. Fireman's Fund Ins. Companies
(1988) 46 Cal.3d 287 40

Navellier v. Sletten
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Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism
(2016) 6 Cal.App.5th 1207 34

Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism
(2018) 4 Cal.5th 637 ..... 13, 27, 38, 39

Nichols v. City of Taft
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Oja v. U.S. Army Corps of Eng'rs
(9th Cir. 2006) 440 F.3d 1122 43

Okorie v. Los Angeles Unified School Dist.
(2017) 14 Cal.App.5th 574, 590 ..... 41, 42

Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.
(C.D. Cal. July 14, 2017) 268 F.Supp.3d 1071..... 52

Paiva v. Nichols
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Perlas v. GMAC Mortgage, LLC
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Quelimane Co. v. Steward Title Gaur. Co.
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Reno v. ACLU,
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San Diegans for Open Gov't v. Har Constr., Inc.
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Schoendorf v. U.D. Registry, Inc.
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Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.
(N.D. Cal. 2015) 144 F.Supp.3d 1088 48

Simpson Strong-Tie Co., Inc. v. Gore
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Sorrell v. IMS Health Inc.
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Tarmann v. State Farm Mut. Auto. Ins. Co.
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Varian Med. Sys., Inc. v. Delfino
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Vergos v. McNeal
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Wang v. Massey Chevrolet
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Westside Ctr. Assocs. v. Safeway Stores 23, Inc.
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Code Civ. Proc. § 425.16 ..... 26, 41, 44

Code Civ. Proc. § 425.17 44

Code Civ. Proc. § 475 40

Other Authorities

Cal. Rules of Court 8.115 34

Deepa Seethaman & Elizabeth Swoskin, *Facebook's Restrictions on User Data Cast a Long Shadow*, Wall St. J., Sept. 21, 2015 17

f82014: Stability for Developers & More Control for People, Facebook newsroom, Apr. 30, 2014, https://newsroom.fb.com/news/2014/04/f8-2014-stability-for-developers-and-more-control-for-people-in-apps/ 17-18

Josh Constine, *Facebook Themes f8 Around a "Stable Mobile Platform," Offers 2-Year API Stability Guarantee*, TechCrunch, Apr. 30, 2014, https://techcrunch.com/2014/04/30/facebook-api-guarantee/ 18

Kelsey Sutton, *Internal Emails Shine Light on Facebook's Approach to Sharing and Selling Data With Developers*, Adweek, Dec. 5, 2018, https://www.adweek.com/digital/internal-emails-shine-light-on-facebooks-approach-to-sharing-and-selling-data-with-developers/ 30

Response to Six4Three Documents, Facebook newsroom, Dec. 5, 2018, https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/ 30

STATEMENT OF APPEALABILITY

This appeal is from an order of the Superior Court denying appellant Facebook's special motion to strike pursuant to Code Civ. Proc. § 425.16. This order is appealable. *Id.* § 425.16(i).

INTRODUCTION

This lawsuit challenges Facebook's right to depublish information for the purpose of protecting user privacy. The anti-SLAPP statute was enacted to foreclose this type of action. Yet the Superior Court summarily denied Facebook's anti-SLAPP motion as untimely based on an intervening change in the law, without considering the factors that compelled acceptance of the late filing under the circumstances here.

That denial was an abuse of discretion, and its consequences have been magnified by Plaintiff Six4Three's continuing use of the litigation process to punish Facebook for exercising its protected speech rights. Since the Superior Court erroneously denied Facebook's motion, Six4Three has escalated its efforts, intentionally violating multiple court orders by releasing thousands of pages of sealed discovery documents. Six4Three's meritless claims should have been stricken and its tactics brought to an end.

In 2007, Facebook launched Facebook Platform, a set of free services, tools, and products that enabled thousands of third-party developers—including Six4Three—to build applications that integrate with Facebook. The Platform initially permitted an app developer, with consent from the user who downloaded the app, to access both (1) the content that the downloading user posted to Facebook *and* (2) the content that the downloading user's friends shared with him on Facebook, so long as those friends' privacy settings allowed such access. Six4Three's only app, "Pikinis," allowed

people to search their own photos—and, critically, those of their Facebook friends—for photos of girls and women wearing bikini bathing suits; the photos could then be "bookmarked" so that the app user could return to them more easily.

In 2014, as part of Facebook's continual effort to protect user privacy and give people control over their information, Facebook announced a modification to its Platform. Starting in April 2015, a developer would still be able to read and use the content of users who had directly granted it access, but Facebook would depublish the photos and other content of those users' *friends* who had not chosen to download the developer's app themselves. Pikinis users would no longer be able to search through their friends' photos for images of strangers in bikinis; they would only be able to search their own photos.

Six4Three sued Facebook in mid-2015, alleging that its decision to depublish this content was unlawful and destroyed Six4Three's business—even though the contract between the parties permitted Facebook to "limit [Six4Three's] access to data." Plaintiff sought a permanent injunction requiring Facebook to re-publish all friend content to developers via the Platform and nearly $100 million in damages, even though it had reaped only $400 in sales from approximately 5,000 downloads during the preceding three years.

The complaint was fundamentally flawed. Most obviously, it did not identify any promise by Facebook to make available, in perpetuity and for free, the content posted by an app user's friends. And the governing law at the time permitted a defendant to bring an anti-SLAPP motion within 60 days of any amended complaint. Accordingly, Facebook reasonably decided to demur to the initial complaint instead of immediately moving to strike it under the anti-SLAPP law. This strategy initially appeared sound: The trial court sustained an early demurrer in full.

But the court permitted Six4Three to amend, and Six4Three took full advantage, spending the next two years engaging in endless gamesmanship to prevent an expeditious resolution on the merits. It added and then abandoned claims, allegations, and theories; it dragged out the discovery process and spoliated evidence; and it added six current and former Facebook officers as individual defendants—for the express purpose of obtaining discovery it had been repeatedly denied by the court. Accordingly, twenty days after Six4Three filed its *fourth* amended complaint, Facebook filed an anti-SLAPP motion. The newly added individual defendants filed a motion as well, making the same arguments.

Facebook's motion was timely under the governing law when it was filed, as well as under the briefing schedule set by the trial court. But the Supreme Court subsequently ruled that an anti-SLAPP motion is timely only if it is filed within 60 days of the *first* complaint containing the pertinent

cause of action. (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637.) Citing *Newport Harbor*, the trial court declined to consider Facebook's motion—even as it granted the anti-SLAPP motion filed by the individual defendants, which addressed identical claims and legal arguments.

This was error. *Newport Harbor* specifically held that the trial court retained "discretion to permit a late motion." *Id*. at 645. The circumstances of this case called for the exercise of that discretion: Facebook relied on the governing law in pursuing a quick resolution on the pleadings rather than resorting immediately to an anti-SLAPP motion. That decision was reasonable in light of the facial insufficiency of the complaint, the greater costs associated with an anti-SLAPP motion, and the California courts' reservations about the potential overuse of anti-SLAPP relief. Two years of litigation abuse, and the gratuitous addition of individual defendants, changed the calculus. The Superior Court abused its discretion by denying Facebook's motion as untimely without considering these factors.

That abuse of discretion was prejudicial. Facebook's motion established that Six4Three's claims all arose from Facebook's exercise of its constitutional right of free speech in defining the audience to whom particular content would be made available through the Platform. The burden then shifted to Six4Three to come forward with admissible evidence establishing a *prima facie* case in support of its claims. But Six4Three

identified *no* admissible evidence supporting *any* of its claims; nor was it able to rebut Facebook's legal arguments—confirming that harassment is the only purpose of this litigation.

This motivation is confirmed by Six4Three's actions since the order under appeal. In what the Superior Court has described as an "unconscionable" and "shock[ing]" violation of multiple explicit court orders, Six4Three's founder and managing director, Theodore Kramer, provided sealed and highly confidential Facebook documents to United Kingdom officials. The UK officials were alerted to those documents by Kramer and a journalist with whom he had been communicating for months.

This Court should reverse and put an end to Six4Three's attempt to use meritless litigation as a lever to change Facebook's editorial policies for Six4Three's benefit, but at the cost of Facebook users' privacy.

STATEMENT OF FACTS

A. Facebook's Free Platform For Third-Party Application Developers

Facebook is a free social networking service that enables users to connect and share information with their family and friends. (AA0288.) A Facebook user's "friends" are the people who have chosen to connect with that user on Facebook. In 2007, Facebook launched the Platform, a set of free services and application program interfaces ("APIs") that Facebook provides to software developers so that they can build applications that

integrate with Facebook's social graph and enhance users' social experiences. (AA0288, 0291-94, 0744.) An API enables an application to communicate (and thus interact) with another application.

Facebook's "Graph" consists of data about Facebook users and their relationships with one another and with pieces of content published on the site. In April 2010, Facebook launched Graph API, a tool that standardizes the Graph data that Facebook makes available to developers through the Platform, making it easier to integrate applications with Facebook. (AA0302.) Graph API initially permitted developers to read and use not only the content posted by the users who downloaded their applications, but *also* the content that those users' friends had shared with them on Facebook, if those friends had consented to such sharing in their Facebook privacy settings. (*Ibid*.)

B. Facebook's Statement of Rights and Responsibilities

Before a developer can build any application that integrates with Facebook, it must agree to Facebook's Statement of Rights and Responsibilities ("SRR"). (AA0310, 0433; *see also* AA0034.)

The December 2012 SRR—the version in place when Six4Three signed up for Facebook, and the version invoked in the complaint—expressly *disclaimed* any commitment to provide developers with permanent, unfettered access to Facebook content and data: "Your access to and use of data you receive from Facebook, will be limited as follows: . . . 9. We can

limit your access to data." (AA0441 ("December 2012 SRR").) "Data" was defined as "any data, including a user's content or information[,] that you or third parties can retrieve from Facebook or provide to Facebook through Platform." (AA0445.) The SRR further stated that Facebook "give[s] you all rights necessary to use the code, APIs, data, and tools you receive from us," but "do[es] not guarantee that Platform will always be free." (AA0441.)

The SRR directed users and developers to "review the following documents, which provide additional information about your use of Facebook." (AA0446.) Those documents, which were linked, included the "Platform Page." (*Ibid.*) At all relevant times, the Platform Page has explained that Facebook will provide 90 days' notice of Platform changes that may cause developers' applications to break. (AA0040.)

Facebook has amended the SRR from time to time, as permitted by the SRR.[1] The version of the SRR that was operative when Six4Three filed its complaint in 2015 removed much of the language that pertained specifically to developers and operators of applications and websites, including the provision that "We give you all rights necessary to use the code, APIs, data, and tools you receive from us." (AA0448-0453.)

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[1] The SRR provided that "[y]our continued use of Facebook following changes to our terms constitutes your acceptance of our amended terms," (AA0437, 0443), and that "[t]his Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements." (AA0445.)

C. Six4Three Develops An App To Locate Photos Of People In Bikini Bathing Suits

Six4Three was founded in December 2012. It has developed only one app: Pikinis, which enables users to search through photos for images of people wearing bathing suits and to bookmark those photos for later use. (AA0309, 0315, 0424-30.) Six4Three agreed to Facebook's SRR on December 11, 2012. (AA0309.) The Pikinis app then used Facebook's Platform, including the Graph API, to search not only the photos uploaded by the user who downloaded the app, but also the photos shared with that user by his or her Facebook *friends* whose settings permitted such access. (AA0309-10, 0315.)

During the three years in which it had access to the content of its users' friends, Six4Three made just over $400 in sales. (AA0244.)

D. Facebook Announces That It Would Depublish The Photos And Content Of App Users' Friends To Protect User Privacy

Over that same period, Facebook received feedback indicating that users wanted more control over whether their personal information would be shared with third-party developers and their apps, and that they were often surprised when a friend shared their information with an app. (See, *e.g.*, AA0325.)[2]

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[2] See also Deepa Seethaman & Elizabeth Swoskin, *Facebook's Restrictions on User Data Cast a Long Shadow*, Wall St. J., Sept. 21, 2015 (cited at AA0334); *f82014: Stability for Developers & More Control for*

To address this feedback, on April 30, 2014, Facebook publicly announced various changes to the Platform and Graph API. As relevant here, Facebook told app developers that they would no longer be able to view and use photos and other content shared by friends of the users who downloaded the developers' apps (as opposed to the photos and content posted by those users themselves). Facebook announced that these changes would take effect in one year. (AA0324.)[3] Six4Three alleges that it received an email from Facebook providing notice of these changes on January 20, 2015. (AA0331.) On or about April 30, 2015, Facebook depublished friend content from the Platform. (AA0333.)

PROCEEDINGS BELOW

A. Six4Three's First Three Complaints

On April 10, 2015, Six4Three filed a ten-page complaint against Facebook and 50 "John Doe" defendants in San Mateo Superior Court, alleging that Facebook's decision to depublish photos of users' friends made it "impossible for [Six4Three] to continue to operate the [Pikinis] App, to abide by the license agreements and purchase terms entered into by

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People, Facebook newsroom, Apr. 30, 2014, https://newsroom.fb.com/news/2014/04/f8-2014-stability-for-developers-and-more-control-for-people-in-apps/ [as of Jan. 30, 2019].

[3] See also Josh Constine, *Facebook Themes f8 Around a "Stable Mobile Platform," Offers 2-Year API Stability Guarantee*, TechCrunch, Apr. 30, 2014, https://techcrunch.com/2014/04/30/facebook-api-guarantee/ (cited at AA0327).

[Six4Three] with its users, and … to recoup any of its investment of capital, human, labor, time, effort, and energy." (AA0026.) Six4Three asserted four causes of action: (1) promissory estoppel; (2) intentional interference with contract; (3) intentional interference with prospective business relations; and (4) violation of California's Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200 *et seq*. (AA0028-30.) Six4Three sought, among other things, damages and a permanent injunction prohibiting Facebook from removing developers' access to their users' friends' photos.

After a conversation with Six4Three's attorneys, but before Facebook was served with the complaint, Facebook's counsel wrote a letter asking that Six4Three voluntarily dismiss the case. (AA1200.) The letter pointed out the complaint's flaws and omissions; stated that "Six4three's lawsuit is frivolous and nothing more than an attempt to chill Facebook's valid exercise of its free speech rights"; and noted that, if Six4Three chose to proceed with the lawsuit, Facebook might bring an anti-SLAPP motion. (AA1200-01.)

Once Six4Three served Facebook with the complaint, Facebook filed a demurrer. (AA1714.) Before the court could rule, however, Six4Three filed an amended complaint adding a claim for negligent misrepresentation. (AA0050-51.)

Facebook again demurred. (AA1706.) The Superior Court sustained the demurrer in its entirety, finding that the amended complaint failed to identify either (1) a clear, unambiguous promise by Facebook to allow

developers to view and use users' friends' photos forever, or (2) Six4Three's reasonable reliance on such a promise. (AA0057-60.) But the court granted leave to amend. (AA0060.)

Six4Three's Second Amended Complaint added 20 pages of new factual allegations—but still did not identify any promise by Facebook to permit developers to access, in perpetuity, the photos and other content posted by the friends of the people who downloaded the developers' apps. (See AA0063-99.) Facebook again filed a demurrer. (AA1700.) The court sustained the demurrer to Six4Three's promissory estoppel claim, but overruled it as to the other claims. (AA0109-112.)

B. Six4Three Injects And Then Withdraws Federal Law Issues

Discovery then began. In January 2017, Six4Three served an interrogatory response stating for the first time that its UCL claim was based on alleged violation of *federal* statutes, including the Federal Trade Commission Act, the Sherman Act, and the Clayton Act. Invoking federal question jurisdiction, Facebook removed the action to the Northern District of California. (AA0135-38.) Six4Three moved to remand and sought fees and costs, but refused to say whether it would rely on federal law. (Doc. 12 at 4, 10-15, No. 3:17-cv-00359 (N.D. Cal. Jan. 27, 2017).) The district court ordered Six4Three to "state *unequivocally* whether it will rely in any way on any federal law to support its claims herein. The response must be either

'yes' or 'no.'" (Doc. 28, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017) [emphasis added].) In response, Six4Three finally stated that it would not rely on federal law. (Doc. 29 at 1, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017).) The court remanded the case but denied Six4Three's motion for fees, explaining that Six4Three's "gamesmanship" made "[d]etermining the nature of Six4Three's case, nearly one year after it commenced, like nailing jelly to the wall." (Doc. 35 at 4, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017).)

C. Six4Three's Fourth And Fifth Complaints And Continued Attempts To Thwart Adjudication Of Its Claims

On remand, Six4Three moved to continue all pretrial deadlines (AA1684) and for leave to amend its complaint a *third* time to add over 30 pages of allegations, four new claims, and six new individual defendants who were current and former executives of Facebook, including CEO Mark Zuckerberg. (AA0172-240, 1683). The Superior Court granted leave to add the new causes of action, but denied leave to add the individual defendants. (AA0246.) Six4Three filed its Third Amended Complaint in July 2017. (AA1664.)

While the motion for leave was pending, Facebook obtained an order compelling Six4Three to produce its historical sales data. Six4Three then informed Facebook that it had permitted that data to be deleted after filing this action. (AA242-43.) In response to Facebook's motion for sanctions,

Six4Three reversed course and represented that no sales data was ever lost or deleted, but produced data for only three of the nine months that the Pikinis app had been live. (AA0243.) The court imposed sanctions limiting Six4Three's evidence of actual sales of the Pikinis app to 276 units, for a total of $412 in revenue. (AA0244.)

Facebook continued to diligently pursue resolution of the action on the merits, filing yet another demurrer and a motion for summary adjudication on the available damages. (AA1662-64.) The court sustained the demurrer with leave to amend as to three of the four new claims, and limited the damages available on the contract claim. (AA0248-51.)

Six4Three, meanwhile, petitioned for a writ from this Court to permit it to add the individual defendants. (See Pet. for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief, *Six4Three, LLC v. Superior Ct. for the Cnty. of San Mateo*, No. A152116 (1st App. Dist. Aug. 11, 2017.) While the petition was pending, Six4Three filed the *Fourth* Amended Complaint, weighing in at nearly 100 pages. (AA0279.)

The Fourth Amended Complaint asserted eight claims, all tracing back to the same theory: that defendants' decision to depublish friends' photos and other content from the Platform was tortious and breached the SRR.

UCL. Six4Three alleged that Facebook and the individual defendants violated the UCL by launching the Platform and Graph API, which induced

Six4Three and other developers to build apps for Facebook at no charge, and by stating that it would offer developers the opportunity to create and monetize apps. Facebook allegedly harmed Six4Three years later by depublishing friends' photos and other content while "oligopoliz[ing]" for itself and unnamed "close partners" the ability to use this content to create photo- and media-searching applications. (AA03336-38.)

Breach of Contract. Six4Three claimed that the statement in the December 2012 SRR that Facebook would provide "all rights necessary to use the code, APIs, data, and tools you receive from us" was a promise to provide perpetual, unlimited access to Facebook's code, APIs, data, and tools, and that Facebook breached that promise in 2015 by depublishing friend data. (AA0339-40.)

Concealment. Six4Three alleged that in 2012, Mr. Zuckerberg and the other individual defendants made the decision (implemented in 2015) to remove Graph API data from the view of developers unless those developers paid Facebook and did not directly compete with it, and that Facebook had a duty to disclose that decision immediately both under the SRR and as a result of various "partial disclosures" that Facebook had made about the Platform. (AA0307-09, 0352-53.)[4]

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[4] These "partial disclosures" included 2012 and 2013 statements that (1) described alleged Reciprocity and Size Policies that permitted Facebook to restrict developers' access to Graph API data; (2) described successful apps on Facebook and expressed Facebook's goal of helping developers

For the first time, Six4Three also alleged that Facebook made unspecified "partial disclosures" about various projects that allegedly violated user privacy. These allegations did not identify any specific statements by Facebook and had nothing to do with Six4Three's alleged injuries; they were apparently included to generate media interest in the case. (AA0348-52.)

Intentional and Negligent Misrepresentation. Six4Three's misrepresentation claims rested on three sets of alleged statements:

- In 2007, Mr. Zuckerberg and Facebook described the Platform as a "big opportunity" for developers to build and monetize "applications that have the same access to integration into the social graph as Facebook applications" (AA289-94, 300);
- In 2010, Facebook explained that the upcoming launch of Graph API would enable developers to search public updates on Facebook and would eliminate the need for them to download a new software development kit whenever Facebook launched a new feature (AA0303); and
- In 2011, Mr. Zuckerberg said that Facebook was working to allow developers to connect to "anything in any way you want" (AA0305).

Six4Three claimed that through these statements Facebook represented that it would forever provide whatever data and tools Six4Three desired, for free and on the same terms as other developers and Facebook itself, and that Facebook would "support" Six4Three in building,

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build apps; and (3) trained developers to build applications. (AA0319-23, 0341-46.)

distributing, and monetizing its application. (AA0354-55, 358; see also AA0294-95.) The complaint alleged that the representations were false because Mr. Zuckerberg later decided in 2012 to preclude all app developers, including Six4Three, from reading and using certain data. (AA0356.)

Intentional Interference With Contract. Six4Three alleged that, by depublishing the photos and other content posted by app users' friends, Facebook and the individual defendants knowingly disrupted Six4Three's handful of license agreements and subscriptions with users (which it had not entered into until after Facebook announced its decision). (AA0360.)

Intentional and Negligent Interference With Prospective Economic Relations. Six4Three alleged that approximately 6,000 people signed up to receive notification of Pikinis' launch. Six4Three also asserted that it had a reasonable expectation of prospective economic relations with "tens of thousands" of other Facebook users, and that Facebook interfered with those relationships by depublishing friend content from the Platform. (AA0360-64.)

Although Pikinis had generated only $412 in sales between 2012 and 2015, Six4Three claimed that the value of its outstanding shares exceeded $4 million in 2015, and alleged lost profits of nearly *$100 million*. (AA0163, 0332.)

D. When Six4Three Files Two More Complaints, Facebook and the Individual Defendants Respond With Anti-SLAPP Motions.

The Fourth Amended Complaint made clear that Six4Three would continue to do everything in its power to prolong the litigation, run up costs, and harass Facebook and its executives. Accordingly, twenty days later, after obtaining the Superior Court's permission, Facebook filed a special motion to strike and for attorneys' fees and costs under the anti-SLAPP statute in November 2017. (AA0394; see also AA0383, 0387-88.) An anti-SLAPP motion may be "filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Code Civ. Proc. § 425.16(f).) At the time, the controlling precedent held that an anti-SLAPP motion filed within 60 days of an *amended* complaint was timely. (See, *e.g.*, *Yu v. Signet Bank/Virginia* (2014) 103 Cal.App.4th 298, 315.)

In December 2017, while Facebook's anti-SLAPP motion was pending, this Court issued a writ of mandate compelling the Superior Court to allow Six4Three to add the individual defendants. (Order, *Six4Three, LLC v. Superior Ct. for the Cnty. of San Mateo*, No. A152116 (1st App. Dist. Dec. 4, 2017.) Six4Three then filed the Fifth Amended Complaint, adding the six individual defendants. The individual defendants responded with their own anti-SLAPP motion in May 2018. (AA1276, 1644.) In the meantime, the Superior Court sustained Facebook's demurrer to the tortious interference claims without leave to amend. (AA1184.)

E. The Superior Court Denies Facebook's Anti-SLAPP Motion But Grants The Individual Defendants'.

While Facebook's anti-SLAPP motion was pending, the California Supreme Court decided *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637. The Supreme Court disapproved *Yu* and held that "subject to the trial court's discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action" under the anti-SLAPP statute "within 60 days of service of the earliest complaint that contains that cause of action." *Id.* at 640. In accord with the statutory language, however, the Court reiterated that the rule was "subject to the trial court's discretion to permit a late motion." *Id*. at 645.

Despite having given Facebook prior approval to file its anti-SLAPP motion, the Superior Court then denied the motion as untimely, relying on the intervening decision in *Newport Harbor*. (See AA1543-48.) The court found that Facebook had not given a "compelling reason" for not filing the motion in response to earlier versions of the complaint. (AA1544.) It dismissed as "not well taken" Facebook's arguments that (1) it had complied with *Yu* (the only precedential decision available at the time of filing, which reflected the majority view until *Newport Harbor*); (2) Six4Three's theories of the case were constantly evolving; and (3) granting anti-SLAPP relief to the individual defendants but denying it to Facebook based on timeliness

would disserve "judicial economy and preservation of resources." (A1544, 1546-47.)

The court then granted the individual defendants' motion, which (as Six4Three's counsel recognized) "complete[ly] overlap[ped]" with Facebook's motion (2RT117:7-10), and which was timely because the individual defendants had not been named in the earlier complaints. The court found that the defendants had shown that Six4Three's claims arose from their exercise of free speech in connection with an issue of public interest: the "editorial decision . . . to de-publish certain categories of user-created content, including friends' photos and other content by means of its API." (AA1550 [quotation marks omitted].) Six4Three, in contrast, had not demonstrated a probability of prevailing on the merits. (AA1551-55.)

F. Six4Three's "Unconscionable" Conduct

In an effort to create media interest, Six4Three's opposition to the individual defendants' anti-SLAPP motion attached hundreds of internal Facebook documents, all designated either "Confidential" or "Highly Confidential," that were cherrypicked to create the false impression that Facebook sold data to developers or required developers to purchase advertising in exchange for data.[5] Six4Three then enlisted the support of the

[5] The parties were prohibited from disclosing documents designated "Highly Confidential" to persons other than counsel for the parties and

media outlets with which it had been communicating throughout the litigation; those organizations joined with Six4Three in seeking to unseal the documents. (AA1635-1637) The Superior Court *sua sponte* struck many of the documents, finding that many were irrelevant to the anti-SLAPP motion or mischaracterized by Six4Three's counsel, and sealed the majority of the remaining documents. (AA1724-25, 1728-34.)

Undeterred, Six4Three proceeded to engage in what the Superior Court described as "unconscionable" and "shock[ing]" conduct.[6] During the week of Thanksgiving, Six4Three announced that Theodore Kramer—a founder and managing director of Six4Three—was in the United Kingdom, had Facebook's Confidential and Highly Confidential documents with him,[7] and intended to disclose the documents to the Digital, Culture, Media, and Sport Committee of the United Kingdom's House of Commons ("DCMS") in less than 24 hours. (AA1741-43.) The UK officials had learned of the sealed documents from weeks of conversations with Mr. Kramer and from a

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employees of counsel, authors or recipients of the documents, and the court, court personnel, and court reporters. (AA0117-18.)

[6] Facebook has moved for judicial notice of or, in the alternative, to augment the record to include the transcript of the November 30, 2018 hearing at which the court made these statements.

[7] This in itself was a violation of the stipulated protected order, which prohibited the disclosure of Highly Confidential information to individual parties or directors, officers or employees of a party. (AA0118.)

reporter with whom Mr. Kramer had been meeting and communicating about the case for months. (AA1772-73.)

On November 20, 2018, the Superior Court confirmed its prior protective and sealing orders and specifically ordered Six4Three not to disclose the documents to the DCMS. (AA1737.) The next day, despite having been informed of the court's order, Mr. Kramer brought his laptop, which contained Facebook's Confidential and Highly Confidential documents, and a thumb drive to the office of the DCMS Chairman—which was located directly across the street from the hotel where Kramer was staying. He then transferred the prohibited material from the laptop to the thumb drive, which he handed to the Chairman. (AA1779.) The DCMS promptly shared the documents with the press. (See Kelsey Sutton, *Internal Emails Shine Light on Facebook's Approach to Sharing and Selling Data With Developers*, Adweek, Dec. 5, 2018, https://www.adweek.com/digital/internal-emails-shine-light-on-facebooks-approach-to-sharing-and-selling-data-with-developers/ [as of Jan. 30, 2019]; *Response to Six4Three Documents*, Facebook newsroom, Dec. 5, 2018, https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/ [as of Jan. 30, 2019].)

The parties are now engaged in costly and burdensome additional discovery into the details and scope of Six4Three's violations of the court's orders.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER FACEBOOK'S ANTI-SLAPP MOTION.

This Court reviews for abuse of discretion a trial court's decision to reject an anti-SLAPP motion as untimely. (*Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543.) A court abuses its discretion if it "is mistaken about the scope of its discretion" and acts in accord with that mistaken view (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1298), such as by failing to consider the relevant factors. (See *Nichols v. City of Taft* (2007) 155 Cal. App. 4th 1233, 1241-42.) "In determining whether to permit a late motion, the most important consideration is whether the filing advances the anti-SLAPP statute's purpose of examining the merits of covered lawsuits in the early stages of the proceedings." (*San Diegans for Open Gov't v. Har Constr., Inc.* (2015) 240 Cal.App.4th 611, 624.) Given Six4Three's substantial expansion of its allegations to include material that was irrelevant to its claimed injury, yet attractive to the media, Facebook's motion served the statutory purpose of cutting off meritless litigation aimed at speech rights before the litigation and its collateral consequences got out of hand.

In addition, although enabling examination of the merits at an early stage is typically the most important factor in deciding whether to permit a late motion, it is not always dispositive. In some circumstances, "[o]ther relevant factors" such as "the length of the delay, the reasons for the late

filing," and the presence or absence of "undue prejudice to the plaintiff" may justify accepting a late filing. (*San Diegans for Open Gov't*, 240 Cal.App.4th at 624.) The reasons for Facebook's delay in this case were both rational and exceptional, and the Superior Court abused its discretion by failing to properly consider them—especially given the absence of undue prejudice to Six4Three.

A. Under The Unusual Circumstances Here, Facebook's Motion Serves The Purpose Of The Statute.

The Superior Court failed to consider how granting Facebook's motion would have advanced the purpose of the anti-SLAPP statute in the unusual context of this abusive litigation. Although Facebook brought its motion after two years of proceedings, deferring anti-SLAPP relief did not defeat or undermine the purpose of the remedy. Quite the contrary: this is a singular case in which the plaintiff's conduct has become increasingly abusive over time, multiplying Facebook's litigation-related expenses and culminating in the recent violation of the Superior Court's protective and sealing orders. Additionally, as part of that escalating course of conduct, Six4Three added the individual defendants years into the litigation; those defendants brought a concurrent anti-SLAPP motion to strike the very same complaint. At the same time the court denied Facebook's motion, it *granted* the individual defendants' motion (AA1548-55)—demonstrating that anti-SLAPP relief at that point in the litigation was not inconsistent with the

purpose of the anti-SLAPP motion. Given Six4Three's demonstrated commitment to drawing out the litigation and using it as a tool for harassment, Facebook's motion, filed within 20 days of Six4Three's fourth amendment, would serve the anti-SLAPP statute's goal of "minimiz[ing] the cost to" Facebook from the abusive litigation. (*Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 682; see also *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

B. Facebook's Delay Was Reasonable.

1. Facebook Had Good Reason To Refrain From Filing Its Motion Until It Did.

Although Facebook was aware that it had the option to file an anti-SLAPP motion immediately, its decision to refrain from doing so was informed and justified by several legitimate and cogent considerations.

First, Facebook justifiably relied on this District's decision in *Yu* holding that a litigant could choose to either file a demurrer or an anti-SLAPP motion without foreclosing its ability to file an anti-SLAPP motion against any subsequent amended complaint. (See *Yu*, 103 Cal.App.4th at 315.) Other Districts had reached the same conclusion. (See, *e.g.*, *Country Side Villas Homeowners Ass'n v. Ivie* (2011) 193 Cal.App.4th 1110, 1115 [holding timely an anti-SLAPP motion that was filed within 60 days of filing of first amended complaint, but not the original complaint]; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835 ["Because the Legislature has specified that

the anti-SLAPP suit law . . . is to be construed broadly, the provision in the law that a special motion to strike 'may be filed within 60 days of the complaint' includes amended as well as original complaints."].)[8]

Second, many California courts have criticized the overzealous use—and misuse—of the anti-SLAPP procedure. (See, *e.g.*, *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 997-1002 [collecting and discussing cases and commentary noting "the ways in which the anti-SLAPP procedure is being misused—and abused"].) In light of these decisions as well as *Yu*, Facebook reasonably chose to defer filing an anti-SLAPP motion while it pursued other ways to resolve the case swiftly.

Third, anti-SLAPP motions generally require the parties to marshal (and the court to consider) evidence. The parties must "make the evidentiary showing required in the summary judgment context" (with the burden of proof reversed). (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 236.) And that showing must be based on "competent admissible evidence" (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017), which in

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[8] A Fourth District panel had reached a contrary result in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, but the California Supreme Court granted review four months later in March 2017. Under the rules in effect at that time, the decision lost precedential effect. (See Cal. Rules of Court, rule 8.115(e) (2017).) As a consequence, there was no conflict within the Courts of Appeal, and *Yu* and the decisions agreeing with it were binding on the Superior Court when Facebook's motion was filed. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

turn requires "[r]ulings on the evidentiary objections." (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347-48.) In contrast, of course, a demurrer requires nothing more than analysis of the complaint.

Six4Three's initial ten-page complaint was patently insufficient. It did not even identify the promise Facebook allegedly broke. Accordingly, it was reasonable for Facebook to expect that a demurrer would be the quickest, most efficient, and least resource-intensive way to obtain dismissal of the case. Indeed, this strategy initially appeared sound, as the Superior Court sustained Facebook's demurrer to the amended complaint in full. It was likewise reasonable for Facebook to believe that it could file an anti-SLAPP motion in response to a subsequent amended complaint if the cost-benefit calculation changed, as it ultimately did.

2. Six4Three's Gamesmanship Precluded A Quick Ruling On The Merits And Warranted Anti-SLAPP Relief.

Facebook's initial expectation that the litigation would be resolved through an early demurrer proved wrong, but not because the claims had merit. To the contrary, Six4Three avoided dismissal only by continually injecting new allegations and theories into the case and by otherwise seeking to delay the proceedings. For example, Six4Three added federal claims to the case, only to abandon them after Facebook removed the case to federal court. That is when Judge Alsup remarked that, because of Six4Three's "gamesmanship," "[d]etermining the nature of Six4Three's case, nearly one

year after it commenced, was like nailing jelly to the wall." (Doc. 35, Order, Case No. 3:17-cv-00359-WHA (Feb. 17, 2017).) But Six4Three was just gearing up. On remand, Six4Three persuaded the Superior Court to continue all of the pretrial deadlines to allow more discovery. Six4Three then impeded the discovery process until the Superior Court imposed sanctions. And two years into the litigation, Six4Three continued to file multiple amended complaints with new allegations and new defendants. These tactics needlessly prolonged the litigation and drove up its costs.

Six4Three's *fourth* amended complaint laid bare the nature and costs of Six4Three's strategy. In particular, Six4Three added allegations that had no bearing on its own claims, for the sole purpose of generating negative media attention in retaliation for Facebook's exercise of its First Amendment rights. To cut off this effort to use the collateral effects of litigation to force a payout, Facebook had good reason to file an anti-SLAPP motion at that point, as it was permitted to do under then-governing law.

The need for anti-SLAPP relief has been confirmed by Six4Three's egregious conduct since the Superior Court denied the motion. Six4Three's "unconscionable" and unlawful release of confidential discovery materials removes any doubt regarding the retaliatory purpose of the litigation, and has predictably multiplied the burdens associated with this litigation—burdens that could have been avoided had the court ruled on Facebook's anti-SLAPP motion. The parties are now undertaking expedited discovery into the

circumstances surrounding Six4Three's misconduct and litigating the appropriate sanctions.

C. There Was No Undue Prejudice To Six4Three.

On the other side of the equation, consideration of Facebook's motion on the merits would not have caused Six4Three any undue prejudice, for at least three reasons.

First, Six4Three affirmatively *urged* the court to address the merits of Facebook's motion, observing that "from a judicial economy perspective[,] … it doesn't make sense to decide purely on the timeliness issue . . . ." (2RT121:20-122:5.) The individual defendants' timely anti-SLAPP motion was before the Superior Court at the same time. And the two motions involved the same issues because the claims against the individual defendants are the same as the claims against Facebook. As Six4Three recognized, "There's a complete overlap there." (*Id.* at 117:7-10.)

Second, Six4Three actually *benefited* from Facebook's decision not to file its anti-SLAPP motion at the outset of the litigation, which gave Six4Three the opportunity to take extensive discovery before having to respond to the motion with evidence supporting a reasonable probability of success on its claims. Six4Three failed to meet that burden, as discussed below, despite its advantage over other anti-SLAPP respondents.

Third, any prejudice to Six4Three was not *undue*. Facebook's decision to bring its anti-SLAPP motion when it did was a direct result of Six4Three's "gamesmanship" and abusive litigation tactics.

D. The Superior Court Abused Its Discretion By Failing To Consider These Factors.

The Superior Court did not properly consider these factors in deciding whether to hear Facebook's motion. The court did not even acknowledge that *Yu* was binding precedent through the end of 2017 and that Facebook justifiably relied on that precedent when it was served with each of the first four complaints and when it filed its motion. The court stated only that Facebook's argument that "it complied with the only precedential decision available at the time of filing is not well taken." (AA1544.) But the court offered no explanation of its reasoning in light of the indisputable accuracy of Facebook's contention. Nor did the court consider whether Six4Three's escalating abusive litigation tactics both justified the timing of the motion and warranted anti-SLAPP relief. And it failed to take into account the lack of prejudice to Six4Three.

Instead, the court identified three reasons for declining to exercise its discretion to hear Facebook's motion. *First*, the court quoted (AA1544-45) the statement in *Newport Harbor* that "[a]n anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation

at the initiation of the lawsuit." (4 Cal.5th at 645 [quoting *San Diegans for Open Government*, 240 Cal.App.4th at 625-26].) *Second*, the court noted that Facebook knew that it could have brought an anti-SLAPP motion earlier, as evidenced by its May 2015 letter. (AA1546.) *Third*, discovery and briefing on various matters had already taken place. (AA1546-47.) None of these reasons justified the court's refusal to consider Facebook's motion.

Both of the first two stated reasons boil down to the fact that Facebook's motion was untimely. But that simply restates the setting for determining whether to exercise discretion to accept an *untimely* filing, without presenting any basis to exercise that discretion either way. The quotation from *Newport Harbor* explains why an anti-SLAPP motion is untimely if not filed within 60 days of the first complaint containing a cause of action. But neither the quotation nor the decision bears on the separate question whether and when a trial court should accept an *untimely* anti-SLAPP motion to "dismiss[] claims in the middle of litigation"—something the Supreme Court acknowledged the trial court retained discretion to do. *Newport Harbor*, 4 Cal.5th at 645. The Superior Court effectively collapsed the timeliness inquiry with the discretion inquiry.

While the third basis for the court's decision—the length of the delay and proceedings that had occurred during that time—is a relevant factor, the court improperly treated it as dispositive by itself. As explained above, the length of delay and stage of proceedings are to be considered in light of the

reasons for the delay and the existence or absence of *prejudice* to the plaintiff. (*San Diegans for Open Gov't*, 240 Cal.App.4th at 624.) In particular, the court should have given weight to Facebook's reliance on the well-established *Yu* line of cases. The California Supreme Court has recognized that it can be unfair to give retroactive effect to changes in procedural law where a party has acted in reliance on it. In those circumstances, "such overruling should operate only prospectively and not retroactively." (*Auto Equity Sales*, 57 Cal.2d at 457; *cf. Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305 [declining to apply new rule retroactively "in the interest of fairness"].) Although the Supreme Court did not prohibit retroactive application of *Newport Harbor* in all cases, similar fairness considerations should guide the discretion of a trial court evaluating a defendant's reliance on then-binding precedent on the timing of an anti-SLAPP motion. And that is especially true here, where Six4Three was not prejudiced, yet its conduct made the need anti-SLAPP relief even more compelling as time went on.

II. THE SUPERIOR COURT'S ERROR IN DECLINING TO CONSIDER FACEBOOK'S MOTION WAS PREJUDICIAL BECAUSE THE MOTION WAS MERITORIOUS.

The court's improper refusal to hear Facebook's motion was highly prejudicial. Facebook established that it was entitled to anti-SLAPP relief, which would have ended both the litigation and Six4Three's abuse of it. (See Code Civ. Proc. § 475.) Under Section 425.16, Facebook was entitled to

have the complaint stricken if (1) it showed that Six4Three's claims arose from Facebook's activities in furtherance of its constitutional right of free speech in connection with an issue of public interest, and (2) Six4Three failed to show a probability of success on the merits of its claims. *Id*. § 425.16(b)(1). Both elements were satisfied.

A. Six4Three's Claims Arise From Facebook's Exercise Of Protected Speech Rights In Connection With A Public Issue.

To carry its burden on the first element of Section 425.16(b)(1), a "defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights." (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590.) In determining whether a cause of action is based on protected activity, the Court "examine[s] the *principal thrust* or *gravamen* of a plaintiff's cause of action" (*id.* at 586)—*i.e.*, "the allegedly wrongful and injury-producing conduct." (*Id.* at 587 (emphasis in original) (quotation marks and brackets omitted).)

The Superior Court recognized that this suit arises from protected speech rights. In granting the individual defendants' anti-SLAPP motion, the court held that "the alleged conduct involves the exercise of the constitutional right of free speech in connection with an issue of public interest." (AA1550.)

The holding was correct. The case arises from Facebook's decision to depublish certain friend content and information from its Platform and thereby preclude Six4Three and other developers from viewing and using that content. "[T]he creation *and dissemination* of information are speech within the meaning of the First Amendment." (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 570 (emphasis added.) And making decisions about *what* information is disseminated, as well as *how* and *with whom* it is shared, is classic protected speech activity. (See, *e.g., Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 422-23; *Kronemeyer v. Internet Movie Database, Inc.* (2007) 150 Cal.App.4th 941, 947.)

The same logic extends to the claims purporting to be based on the terms of the SRR or other statements about the Platform. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-90 [holding anti-SLAPP statute applied to fraud claims based on defendant's alleged misrepresentations and omissions in connection with protected conduct and breach of contract claims where protected activity was the alleged breaching activity]; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 202 [collecting cases].) For each claim, the allegedly "wrongful and injury-producing conduct" is the decision to alter the audience who receives particular content. (*Okorie*, *supra*, 14 Cal.App.5th at 587.) Had Facebook not depublished friends' photos and other content

from the view of developers, Six4Three would have no harm to complain about, on any theory.

Six4Three did not dispute below that a decision defining the audience for particular content is protected activity covered by the anti-SLAPP statute, or that the issues here are of public interest. Instead, Six4Three maintained that Facebook's decisions and actions were not protected because it merely "sen[t] data through a software API," which "put[] it in a database." (AA0522.) But the fact that Facebook used the Internet and software as its medium for disseminating content to developers like Six4Three does not strip Facebook of its constitutional protections. The U.S. Supreme Court has recognized that content posted through the Internet receives the same "level of First Amendment scrutiny" as traditional print and news services. (*Reno v. ACLU*, (1997) 521 U.S. 844, 870.) "[W]eb content" is "functionally identical to published traditional print media." (*Oja v. U.S. Army Corps of Eng'rs* (9th Cir. 2006) 440 F.3d 1122, 1130; see also *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 42 n.64 [recognizing that the Internet is a public forum and information posted on the Internet is protected by the anti-SLAPP statute].) And, in any event, "send[ing] data through a software API" to thousands of developers constitutes the equally protected "dissemination of information." (*Sorrell*, 564 U.S. at 570.)

B. The Commercial Speech Exemption Does Not Apply.

Six4Three argued below that Facebook's conduct fell within the commercial speech exemption to the anti-SLAPP statute. That exemption precludes (1) a "person primarily engaged in the business of selling or leasing goods and services" from invoking the statute if (2) the challenged "statement or conduct consists of representations of fact about that person's or a competitor's business operations, goods or services" made for the purpose of promoting the speaker's business *and* (3) "the intended audience is an actual or potential buyer or customer." (Code Civ. Proc. § 425.17(c).) This exception is "narrowly construed." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22; see also *Dean v. Friends of Pine Meadow* (2018) 21 Cal.App.5th 91, 98.) Six4Three failed to establish any of the exemption's three elements.

First, as a threshold matter, Facebook is not subject to the commercial speech exception at all: Division Two of this District has already held that "while Facebook sells advertising, it is not *primarily* engaged in the business of selling or leasing goods or services." (*Cross*, *supra*, 14 Cal.App.5th at 203 (emphasis added).) Like the plaintiff in *Cross*, Six4Three has not alleged, must less proved, that Facebook is primarily engaged in the business of selling goods or services. "Nor could [it], as Facebook offers a free service to its users" and developers. (*Ibid*.) Indeed, Six4Three has acknowledged that Facebook does not charge developers for using its Platform. (AA0744.)

In evaluating the individual defendants' motion, the Superior Court suggested that *Cross* was distinguishable because the plaintiff in *Cross* was a Facebook user, whereas Six4Three is a developer. (AA1556.) But that distinction is irrelevant. Whether Facebook is "primarily engaged in the business of selling or leasing goods or services" does not turn on the identity of the plaintiff, but on *Facebook's* business. (See *Dean*, *supra*, 21 Cal.App.5th at 105 [explaining that this requirement of the exception "focus[es] on *the speaker*"] [emphasis added; internal quotation marks omitted].)

The Superior Court further suggested that this action "closely resemble[s]" *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, which denied an anti-SLAPP motion on commercial-speech grounds. (AA1556.)[9] The plaintiff in *Demetriades* was an advertiser on Yelp, a website and search engine for local businesses that sells advertising to generate revenue. The plaintiff alleged that it had purchased ads based on false statements by Yelp about its user review filter. (228 Cal.App.4th. at 300-01.) The Court of Appeal held that Yelp is "primarily in the business of providing advertising to businesses"; the user reviews were merely a "device . . . to attract users and ultimately purchasers of advertising on its site." (*Id.* at 312.)

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[9] The court declined to decide whether the commercial exemption applied to Facebook because Six4Three proffered no evidence, argument, or authority on the commercial speech issue. (AA1556-57.)

Demetriades is inapposite here. Six4Three did not, and could not, show that Facebook's dissemination of user content, as well as the other services that it provides to users and developers, are merely incident to its sale of advertising.

Second, the statements and conduct at issue—for example, statements that "[w]e want to make Facebook into something of an operating system so you can run full applications" (AA0289) and that "deep integration, mass distribution, and new opportunity" were themes of the Facebook Platform (*ibid.*)—are not representations of fact, and were not made for the purpose of obtaining approval for, promoting, or securing sales of anything. The only thing Facebook is alleged to sell is advertising. The conduct at issue in this case—Facebook's decision to depublish certain content and its statements about the Platform and Graph APIs—had nothing to do with promoting or securing sales of advertising—and Six4Three did not and cannot demonstrate otherwise.

Third, because the statements and conduct at issue were not made for the purpose of promoting or securing sales of advertising, the intended audience—developers like Six4Three, who could integrate their apps with the Platform free of charge—were not "actual or potential buyer[s] or customer[s]."

C. Six4Three Failed To Show A Probability Of Success On The Merits Of Its Claims.

Because Facebook satisfied the first prong of the anti-SLAPP statute, the burden shifted to Six4Three to show a probability of success on the merits of its claims by "demonstrat[ing] the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier*, 29 Cal.4th at 88-89.) Six4Three could not meet this burden based on allegations made on "information and belief" or hearsay; rather, it was required to submit *admissible evidence*. (See *Evans v Unkow* (1995) 38 Cal.App.4th 1490, 1497-98; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1397.) Six4Three did not carry that burden.

1. The Communications Decency Act Bars All Of Six4Three's Claims.

As a threshold matter, the Communications Decency Act ("CDA") bars all of Six4Three's claims. Section 230 provides: "No [1] provider or user of an interactive computer service [2] shall be treated as the publisher or speaker of any information provided by [3] another information content provider." (47 U.S.C. § 230(c)(1).) "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (*Id.* § 230(e)(3).) All three elements are satisfied here.

First, Six4Three conceded that Facebook provides an interactive computer service. (2RT160:3-4.) *Second*, Six4Three seeks to treat Facebook

as the publisher or speaker of information; and *third*, that information was provided by another information content provider, namely Facebook users. "[P]ublication involves reviewing, editing, and deciding whether to publish or to *withdraw from publication* third-party content." (*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094 [emphasis added; quotation marks omitted].) Indeed, "the very essence of publishing is making the decision whether to print or retract a given piece of content." (*Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1359.) Accordingly, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." (*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-71; see also *Green v. Am. Online (AOL)* (3d Cir. 2002) 318 F.3d 465, 471 [Section 230(c)(1) bars claims "relating to the monitoring, screening, and deletion of content from [a covered service's] network—actions quintessentially related to a publisher's role"].) A plaintiff challenging such activity cannot avoid the CDA's application "simply by changing the name of the theory." (*Barnes v. Yahoo Inc.* (9th Cir. 2009) 570 F.3d 1096.)

Despite the numerous labels Six4Three puts on its claims, at bottom, all of its claims are challenging the same protected conduct. As Six4Three's counsel put it, the "nub of this case" is that "Facebook had internally decided as early as 2012-2013 . . . that they were going to shut down the platform;

that they were going to basically, instead of making all of this data available to all app developers . . . [w]hat they decided to do is shut off access to the data." (1RT23:16-24:5.) In other words, Six4Three's claims all center on Facebook's decision to exclude from the Platform certain content posted by users. That decision is immune under the CDA.

The Superior Court characterized this argument as "moving," but questioned whether it was foreclosed by *Demetriades*. (AA1553, 1556.) In that case, the Court of Appeal held that the CDA was inapplicable because the plaintiff did not "seek to enjoin or hold Yelp liable for the statements of third parties (*i.e.*, reviewers) on its Website"; it sought only to enjoin Yelp from making misleading statements about its filters. (228 Cal. App.4th at 313.) The court concluded that "such relief would not interfere with Yelp or its users' commercial speech" because it would "not affect the content . . . or the availability of Yelp's reviewers' statements." (*Id.* at 312.) By contrast, although Six4Three complains about general statements made by Facebook about access to content via the Platform, the complaint makes clear that the motivating force behind its claims is the foreclosing of Six4Three's access to friends' photos and other content. Unlike in *Demetriades*, Six4Three is not seeking to enjoin Facebook's statements about its Platform or to obtain a refund of money spent on advertising. Instead, Six4Three seeks damages and injunctive relief that would directly affect *Facebook's decisions about the availability of content posted by users*. All of Six4Three's claims directly

seek access to third-party content that Facebook has chosen *not* to make available any longer. *Demetriades* is inapposite.

2. Six4Three Has No Reasonable Probability Of Success On Its Claims.

Even apart from the CDA's bar, Six4Three failed to show a likelihood of success on the merits: Its allegations failed as a matter of law, and even after a year of discovery, Six4Three was unable to muster any admissible evidence in support of its claims.

a. *Six4Three Lacked Evidence Of A Promise That Could Support Its Breach Of Contract Claim.*

Six4Three claims that by depublishing the photos and other content of users' friends from the Platform, Facebook breached a provision of the December 2012 SRR stating that Facebook will give Six4Three "all rights necessary to use the code, APIs, data, and tools you received from us." (AA0339-40.) This claim is fatally flawed in several respects.

First, Six4Three offered no evidence that the December 2012 version of the SRR was the operative agreement between the parties at the time of the alleged breach in 2015. On the contrary, unrebutted evidence showed that Facebook amended the SRR several times, including on January 30, 2015 (AA0448), and that Six4Three agreed that continued use of Facebook's services would constitute its acceptance of any amendments to the SRR. (See AA0443.) The 2015 SRR does not contain the provision on which Six4Three relies. (AA0448-53.)

Second, even if that clause had been in place at the time of the alleged conduct, it would not support a contract claim. The provision is not an open-ended promise to provide all developers unfettered access to Facebook's proprietary code, APIs, data, and tools in perpetuity. Rather, it obligates Facebook to provide only the "rights necessary to use the code, APIs, data, and tools *you receive from us*." (AA0441 [emphasis added].) In other words, Facebook committed only to provide Six4Three with the rights necessary to use the code, APIs, data, and tools Facebook *chose* to make available to Six4Three. Nothing constrained Facebook's decision about which code, API, data, and tools it would make available.

Third, a different provision of the 2012 SRR expressly authorizes Facebook's conduct and *bars* Six4Three's claim. Section 9(2)(9) states: "We can limit your access to data." (*Ibid*.) Far from breaching the 2012 SRR, Facebook's decision to depublish friend content and data was specifically *permitted* by that contract.

b. *Six4Three Provided No Evidence To Sustain Its Claim For Interference With Prospective Economic Relations.*

The legal insufficiency of Six4Three's interference claims is evident from the face of the complaint—which is why the trial court sustained *without leave to amend* Facebook's demurrer to these causes of actions while the anti-SLAPP motion was pending. (AA1184.) Six4Three was required to plead the existence of "*specific* economic relationships with identifiable

third parties, which defendants knew about and intentionally disrupted through a wrongful act." (*Buxton v. Eagle Test Sys., Inc.* (N.D. Cal. Mar. 26, 2010) 2010 WL 1240749, at *2 [emphasis added].) Six4Three made no such allegations; it merely pointed to the fact that some users had already downloaded the app, and alleged that it could have convinced over 100,000 people to become paying customers of Pikinis if it had retained access to friends' photos and other content. (AA0363.) This was insufficient: "general identification of [a plaintiff's] present and potential future end-user customers" is insufficient to plead the requisite economic relationship. (*Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.* (C.D. Cal. July 14, 2017) 268 F.Supp.3d 1071, 1090.) Rather, this tort requires "an existing relationship with an identifiable buyer." (*Westside Ctr. Assocs. v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 523-27.)

Six4Three's evidentiary showing was likewise deficient. It produced *no* proof of any economic relationship with a third party, much less evidence that Facebook *knew* about any such relationship.

c. *Six4Three's Interference With Contract Claim Fails.*

Six4Three's interference with contract claim was similarly unsupported. Six4Three was required to prove that Six4Three had a valid contract with a third party, and that Facebook knew of that contract and took intentional steps designed to induce a breach or disruption of the contractual

relationship. (*Quelimane Co. v. Steward Title Gaur. Co.* (1998) 19 Cal.4th 26, 55.) Six4Three presented no evidence that Facebook knew of and took intentional steps designed to induce a breach of contracts between Six4Three and Pikinis users. Nor could it: Facebook announced its decision to depublish users' friends' photos from the Platform on April 30, 2014, before Pikinis was even made available for sale, and therefore *before* Six4Three ever entered into any contract with third parties. (AA0480-502.)

d. *Six4Three's Intentional And Negligent Misrepresentation Claims Fail.*

Six4Three claims that Facebook intentionally and negligently misrepresented that it would give developers permanent, free, open, and equal access to Facebook's data and content and would "support" them in building applications in perpetuity. (AA0354-55, 0358-59.) This claim likewise suffers from several fatal legal and evidentiary defects.

First, Six4Three fails to identify any statement by Facebook that in fact promised—or misled anyone into believing that it was promising—to give developers permanent, free, open, and equal access to Facebook's data and content forever.

Second, even if any statements by Facebook could be read to be such promises, they are not actionable. To be actionable, an alleged misrepresentation "must ordinarily be as to past or existing material facts." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.)

Only when a promise of future conduct was "made without any intention of performing it" can a broken promise of future conduct be actionable. (*Ibid.*) None of the alleged "representations" here concern past or existing fact. Instead, Six4Three alleges that Facebook made representations about Facebook's *future* action, and Six4Three neither alleged nor submitted admissible evidence that Facebook made those representations with no intention of following through. Nor could it: the alleged representations occurred between 2007 and 2010, see p.24 *supra*, and Six4Three alleges that it was not until *2012* that Facebook decided to remove friends' photos and other content from the Platform.

Third, Six4Three did not, and cannot, show that it reasonably relied on the alleged representations. (See *Garcia v. Superior Ct.* (1990) 50 Cal.3d 728, 737 [plaintiff asserting negligent misrepresentation claims "must allege facts sufficient to show that [he] actually and reasonably relied on the alleged misrepresentations"]; *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434 [same as to intentional misrepresentation].) Six4Three produced no documents or evidence showing that it was aware of Facebook's statements, much less that it relied on them. Nor could it have reasonably relied on purported assurances that Facebook would allow developers to read and use the content of users' friends—for free and in perpetuity. A party cannot offer parol evidence to "show a promise which contradicts an integrated written agreement." (See, *e.g.*, *Wang v. Massey Chevrolet* (2002)

97 Cal.App.4th 856, 873.) The December 2012 SRR specifically provided that Facebook could limit Six4Three's access to data, including users' content and information, and that "[t]his Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements." (AA0441, 0445.) And the SRR specifically directed developers to the Platform Page, which notified developers of Facebook's ability to make breaking changes with 90 days' notice. (AA0446; see also A0040.) Accordingly, Six4Three could not have reasonably relied on statements outside the SRR that it believed suggested that Facebook would provide it with free access to all user data and content in perpetuity, in direct contradiction to the terms of the agreement.

e. ***Six4Three's Concealment Claim Fails for Want of Evidence Of A Concealed Material Fact Or A Duty To Disclose It.***

Six4Three's concealment claim fares no better. Six4Three alleges that Facebook concealed the supposed fact that it had decided in 2012 to remove from the Platform certain friend content, including the photos posted by app users' friends. (AA0352-53.) Even assuming *arguendo* that Facebook made such a decision (which it did not), Six4Three failed to show that Facebook had a duty to disclose it, or that its alleged breach of such a duty induced Six4Three to act to its detriment. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868-69.)

Six4Three claims that a duty of disclosure arose from "the fact that [Six4Three] and Facebook had entered into a commercial agreement" (AA0353), but a "commercial relationship" does not give rise to a duty to disclose. (*Los Angeles Mem. Coliseum Commission v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 832.)

Nor did Six4Three establish a duty to disclose by alleging that Facebook made "partial disclosures of fact and misinformation . . . to [Six4Three] and other Developers concerning the manner in which Facebook collects, stores and transmits data." (AA0352-53.) Six4Three purports to rely on a veritable kitchen sink of statements by Facebook about its policies, photo database, aspirations for developers, how developers could build apps, and updates to the API. (AA0341-47). But Six4Three provides no evidence identifying these representations or showing that they suppressed material facts.

Six4Three also alleges that Facebook made partial representations about projects involving its users' privacy. (AA0349-52.) But Six4Three did not identify—much less provide evidence supporting—any alleged partial statements Facebook made about these alleged projects, let alone who made those statements, or when or where they were made. Nor does Six4Three connect these alleged representations to this case. As noted above, Six4Three claims to have been injured by the removal of friends' photos from the Platform; none of the alleged privacy projects was related to

that action. Instead, the addition of these allegations in the Fourth Amended Complaint is explicable only as an attempt to generate negative press about Facebook and harass Facebook for exercising its right to free speech.

f. ***Six4Three Presented No Evidence Of Unfair, Unlawful, Or Fraudulent Conduct That Could Sustain Its UCL Claim***.

Six4Three likewise failed to present evidence sufficient to show a probability of success on its UCL claim.

For the reasons explained above, Six4Three neither pleaded nor presented evidence of an unlawful or fraudulent act by Facebook. Nor did it plead or present evidence of an "unfair" act—*i.e.*, conduct that constitutes or threatens an incipient violation of the antitrust laws or "otherwise significantly threatens or harms competition." (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) Six4Three claims that Facebook was part of an illegal "oligopoly" (AA0281-82, 0287, 0309, 0335-37) with other unspecified companies in various software markets. But Six4Three provided no evidence of any such agreements or arrangements with other companies, nor did it provide any evidence of harm to any markets.

CONCLUSION

This Court should reverse the decision of the Superior Court and remand for entry of an order granting Facebook's special motion to strike Six4Three's complaint.

Dated: February 6, 2019

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CERTIFICATION OF COMPLIANCE WITH RULE 8.204

In compliance with California Rules of Court, Rule 8.204(c)(1), I hereby certify that the Brief of Appellant contains 10,863 words, including footnotes, as calculated by the word processing software used to prepare the brief.

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I, Cristina Henriquez, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On February 6, 2019, I served the foregoing document(s) described as:

BRIEF OF APPELLANT

☐ By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail.

☐ By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.

☐ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope, addressed as set forth below, to be delivered to an overnight service agent for delivery.

☒ By causing the document(s) listed above to be served electronically on the person(s) at the address(es) set forth below using the True Filing program.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 6, 2019, at Palo Alto, California.

/s/ Cristina Henriquez
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